

No. 11,721

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

RICHARD A. NUMER,

Appellant,

VS.

R. J. MILLER, Associate Warden, et al.,
United States Penitentiary, Alca-
traz, California, et al.,

Appellees.

BRIEF FOR APPELLEES.

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Subject Index

	Page
Jurisdictional statement	1
Statement of the ease	2
Question	4
Contention of appellees	4
Argument	4
Summary	6
Conclusion	7

Table of Authorities Cited

Cases	Pages
In re Stewart, N.D. Cal. S.D., 1 F.R.D. 105.....	5
Kelly v. Dowd (CCA-7), 140 F. (2d) 81, 83, certiorari denied, 320 U.S. 786	6
Platek v. Aderhold (CCA-5), 73 F. (2d) 173, 175.....	6
Reilly v. Hiatt, 63 F. Supp. 476.....	6
Sarshik v. Sanford (CCA-5), 142 F. (2d) 676.....	6
Snow v. Roche, Judge (CCA-9), 143 F. (2d) 718, certiorari denied, 323 U.S. 788.....	6
Youngblood v. United States, 141 F. (2d) 912, 914.....	5

Statutes

Title 18 U.S.C.A., Section 753(a)	2, 5
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Rules

Rules of Civil Procedure for District Courts, Rule 81(b) 28	
U.S.C.A., following Section 723(c)	5

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JURISDICTIONAL STATEMENT.

The method by which appellant (an inmate of the United States Penitentiary at Alcatraz Island, California) seeks to invoke the jurisdiction of the United States District Court for the Northern District of California, hereinafter called "the Court below" and the jurisdiction of this Honorable Court to review the decision of the Court below denying appellant's petition for mandatory relief against the prison authorities of the said penitentiary, is set forth in the said appellant's jurisdictional statement on page 1 of his opening brief.

STATEMENT OF THE CASE.

The appellant, an inmate of the United States Penitentiary at Alcatraz Island, California, instituted an action in the nature of a petition for writ of mandamus, to compel the prison authorities of the said penitentiary to allow him to take a correspondence course in English at the University of California. (Tr. 1-8.) An order to show cause thereupon issued (Tr. 10) and the appellees filed a motion to dismiss, asserting that the said application failed to state a cause of action. (Tr. 11.) The matter was then set for hearing on the motion to dismiss and the Court below ordered the appellant produced in Court for hearing. (Tr. 15.) Thereafter the matter was heard, the petitioner stating the reasons, both factual and legal, for his application, and the appellees arguing that the relief sought involved an exercise of discretion under the rules promulgated for the governance of penal institutions in accordance with the provisions of Title 18 U.S.C.A., Section 753a. (Tr. 16-28.) It was conceded by appellees that they have permitted certain other inmates to take correspondence courses. The matter was then submitted and the Court below entered the following order denying petition for writ of mandamus and discharging the order to show cause:

“The petitioner, an inmate of the United States Penitentiary at Alcatraz Island, California, seeks by petition for writ of mandamus to compel the prison authorities to grant him the right to take a correspondence course in English at the University of California. In moving to dismiss the petition on the ground that the said application

fails to state a cause of action upon which relief can be granted, the respondents argue that their actions involve an exercise of their discretion under the rules promulgated for the governance of penal institutions in accordance with the provisions of Title 18 U.S.C.A., Section 753a.

This contention of the respondents is sound since it is well settled that it is not the function of the Courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined.

Sarshik v. Sanford, (CCA-5), 142 F. (2d) 676;

Platek v. Aderhold, (CCA-5), 73 F. (2d) 173, 175;

Kelly v. Dowd, (CCA-7), 140 F. (2d) 81, 83, certiorari denied, 320 U.S. 786.

Ordered that the petition for writ of mandamus be, and the same is hereby, dismissed, and that the order to show cause be, and the same is hereby, discharged.

Dated: April 17th, 1947.

Michael J. Roche,
United States District Judge".

(Tr. 30-31.)

From this latter order appellant appeals to this Honorable Court. (Tr. 37.)

QUESTION.

May the prison authorities of a United States penitentiary deny an inmate permission to take a correspondence course in English while permitting certain other inmates to take the course?

CONTENTION OF APPELLEES.

The answer to the above stated question is: Yes.

ARGUMENT.

This is not the first time that the appellant has unsuccessfully sought redress of the Courts to compel the authorities at Alcatraz penitentiary to grant him what he insists are his rights.

In case No. 25,025-R, United States District Judge Michael J. Roche denied appellant's request that he be granted certain purchase privileges. In case No. 25,037-S, United States District Judge A. F. St. Sure denied appellant's application for certain recreational privileges.

In case No. 25,070-G, United States District Judge Louis E. Goodman denied appellant's application that he be allowed to retain certain articles of personal property, and in case No. 26,212-G Judge Goodman denied appellant's application for certain medical privileges.

It should also be noted that all of these applications were filed in the United States District Court for the

Northern District of California within a period of less than a year during 1945 and 1946.

The appellees have narrowed the issues involved herein to the sole question as to whether the prison authorities of a United States penitentiary may deny an inmate permission to take a correspondence course while permitting certain other inmates to take the course, although the instant application might properly have been denied in view of the abolishment of writs of mandamus.

See

Rules of Civil Procedure for District Courts,
Rule 81(b), 28 U.S.C.A., following Section
723(c).

See also

In re Stewart, N.D.Cal. S.D., 1 F.R.D. 105;
Youngblood v. United States, 141 F. (2d) 912,
914.

Title 18 U.S.C.A., Section 753a reads in pertinent part as follows:

“The Bureau of Prisons shall have charge of the management and regulation of all Federal penal and correctional institutions and be responsible for the safekeeping, care, protection, instruction and discipline of all persons charged with or convicted of offenses against the United States * * *”.

Under authority of this statute the action of the appellees involved an exercise of discretion under the rules promulgated for the governance of inmates of Federal penal institutions. Certainly such action was

in no sense an abrogation of a personal right or a constitutional guaranty, as for example, a denial of access to the Courts. Thus the remedy sought by appellant would not lie.

See

Snow v. Roche (Judge), (CAA-9), 143 F. (2d) 718, certiorari denied, 323 U.S. 788;
Reilly v. Hiatt, 63 F. Supp. 476.

Furthermore, as the Court below indicated in its order denying appellant's application for a writ of mandamus, it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries but only to deliver from imprisonment those who are illegally confined.

Sarshik v. Sanford, (CCA-5), 142 F. (2d) 676;
Platek v. Aderhold, (CCA-5), 73 F. (2d) 173, 175;
Kelly v. Dowd, (CCA-7), 140 F. (2d) 81, 83;
 certiorari denied, 320 U.S. 786.

SUMMARY.

The appellant has had unrestricted access to the courts to air his grievances, even though they are without foundation. In refusing appellant permission to take a correspondence course, the prison authorities did not deprive him of any constitutional right or guaranty but rather properly exercised a discretion conferred by statute. Therefore, the Court below, in

denying appellant's petition for writ of mandamus, correctly held, as it did, that it is not the function of the courts to interfere with the treatment or discipline of prisoners but only to deliver from imprisonment those who are illegally confined.

CONCLUSION.

In view of the foregoing it is respectfully urged that the order of the Court below is correct and should be affirmed.

Dated, San Francisco, California,
November 5, 1947.

Respectfully submitted,

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JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellees.

